JAN 31 2006

(55)

No. 05-184

IN THE

# Supreme Court of the United States

SALIM AHMED HAMDAN,

*Petitioner,*

*v.*

DONALD H. RUMSFELD, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* ON BEHALF OF FORMER FEDERAL JUDGES SHIRLEY M. HUFSTEDLER AND WILLIAM A. NORRIS IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS FOR WANT OF JURISDICTION

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Dated: January 31, 2006

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to Guantanamo Bay. See *Rasul*, 542 U.S. 466 (2004); see also id. at 485-488 (Kennedy, J., concurring). *Johnson v. Eisentrager*, 339 U.S. 763 (1950), had held that certain aliens detained overseas by the United States were not entitled as a constitutional matter to habeas corpus in federal courts. This Court distinguished such aliens from those, like Petitioner, imprisoned in Guantanamo, *Rasul*, 542 U.S. at 476 (listing differences in facts "critical" to *Eisentrager*'s constitutional holding), and it concluded that Guantanamo is within the "territorial jurisdiction" of the United States. Id. at 480 (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (distinguishing lands within the "territorial jurisdiction" of the Untied States with those that are mere "possessions")). Indeed, this Court concluded that Guantanamo was "sovereign territory" of the United States in the sense that defined the "historical reach of the writ of habeas corpus" at common law. Id. at 481-482. Those at Guantanamo – ordinary prisoners held on suspicion of crime on the base, for example, as well as detainees in the situation of Petitioner – are entitled therefore to seek habeas relief from the federal courts under the Constitution. Accord *Hirota v. MacArthur*, 338 U.S. 197, 201-202 (1948) (Douglas, J., concurring) ("Habeas corpus is an historic writ and one of the basic safeguards of personal liberty. See *Bowen v. Johnston*, 306 U.S. 19, 26. There is no room for niggardly restrictions when questions relating to its availability are raised. . . . Today Japanese war lords appeal to the Court for application of American standards of justice. Tomorrow or next year an American citizen may stand condemned in Germany or Japan by a military court or commission. If no United States court can inquire into the lawfulness of his detention, the military have acquired, contrary to our traditions (see *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1), a new and alarming hold on us.").

Even more directly, Justice Kennedy distinguished *Eisentrager* while applying its framework to conclude that for Guantanamo detainees, unlike the detainees in

*Eisentrager*, there was, indeed, a constitutional entitlement to seek habeas relief. See id. at 486-488 (Kennedy, J., concurring in judgment). He relied first upon the fact that "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed form any hostilities," id. at 487, and second upon the conclusion that the need for "continued detention to meet military exigencies" had weakened "as the period of detention stretches from months to years." Id. at 488. A petition for habeas from a Guantanamo detainee he concluded is "within the proper realm of the judicial power." Id. at 486. Thus, he concluded that, unlike the complaints brought by the German prisoners in *Eisentrager*, the complaints of the Guantanamo detainees do not "concer[n] matters within the exclusive province of the Executive, or the Executive and Congress, to determine." Id. He concluded Guantanamo detainees like Petitioner have a right under the Constitution to bring petitions for habeas corpus.

Thus, whether what the Suspension Clause protects is habeas as its scope was at the time of the Framing, or habeas as its scope is today, this statute implicates the Suspension Clause. Under that Clause, Congress lacks power to suspend the writ of habeas corpus with respect to such detainees "unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I. Sec. 9, cl. 2. "[W]here statutory jurisdiction to issue the writ obtains, but the privilege of it has been suspended in particular circumstances, the Court has declared itself ready to consider the validity of the suspension and, if it is found invalid, of the detention." Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L. Rev. 1362, 1398 (1953) (hereinafter "Hart's *Dialogue*") (citing *Ex Parte Milligan*, 71 U.S. 2 (1866)).

Section 1005 violates the Suspension Clause for at least two reasons. To begin with, the war on terror under which detainees are being held at Guantanamo, grave though it is, involves neither "Rebellion" nor "Invasion" such that

Congress may suspend the writ. The seriousness of the war on terror and the seriousness of the threat posed by Al Qaeda cannot be gainsaid. And *amici* believe that the United States should, and under the Constitution does, have at its disposal all the tools necessary to fight and win the war on terror. But the Constitution contains no exception for wartime, and even the Suspension Clause is limited to the circumstances justifying its inclusion in the Constitution. "The Suspension Clause was by design a safety valve, the Constitution's only 'express provision for exercise of extraordinary authority because of a crisis.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring)). As Justice Scalia wrote two years ago "Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked." Id.

There can be no question that there is no "Rebellion" now taking place in the United States; we cannot imagine that the Government would contend otherwise. Nor are we faced today with any "Invasion" within the meaning of the Suspension Clause. The dastardly attacks of September 11 took place on American soil. But if they involved an "invasion" sufficient to warrant suspension of the writ, that invasion ended long ago. And if the threat of another such act is enough of a threat of invasion to permit suspension of the writ, then now, and for the rest of our lives, the writ may be suspended throughout the United States, though there are no ongoing hostilities and the civilian courts remain open. The dictionary defines invade to mean "to enter for conquest or plunder." Merriam Webster Online Dictionary available at http://www.m-w.com/dictionary/invade (first definition). No such invasion is going on now and there are no ongoing hostilities on American soil, the hallmarks of invasion.

Indeed, with its pairing of "rebellion" with "invasion," the structure of the Clause confirms this reading of the latter word. Both "rebellion" and "invasion" include

only situations when there is warfare here within the United States. While the war on terror poses grave threats, blessedly, at least at the moment, there is no such warfare.

Second, this Suspension is not "required" by the "public safety." To begin with, the statute's own terms make any such claim impossible: The Act does not purport to eliminate entirely federal court review of all claims even of the most dangerous Guantanamo detainees, those who will be tried by military commission and sentenced to death. See DTA §1005(e)(3) (providing for limited review as of right of this class of military tribunal convictions). Rather, this statute seeks to effect, with respect to *that* most serious class of cases, a rule of abstention, structuring, but not eliminating, judicial review.

While this may be an appropriate action for Congress to take with respect to other statutory causes of action, it may not do so with respect to habeas. It is authorized to suspend the writ only where public safety requires. But this kind of law, which actually leaves federal courts open in the most grave class of cases, renders implausible any argument that suspension is required for the public safety.

Finally, the statute fails the public safety bar in a second way. The Constitution's Suspension Clause envisions threats to public safety of the dimension associated with invasion or rebellion. And a congressional judgment that such a threat exists must certainly be granted broad latitude. But this does not leave this Court without a responsibility to exercise its judgment to determine that there is at least a plausible case to be made that public safety is in that serious way threatened by continued availability of the writ of habeas corpus.

Here, no such claim can plausibly be made. The circumstances under which Congress has acted to deny habeas relief to the prisoners at Guantanamo – to overrule this Court's decision in *Rasul* – prisoners held in a United States territory "far removed from any hostilities" and for such a long period of time that "the case for continued

detention to meet military exigencies" lacks force, *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring), simply fails even to resemble the situation of a threat to public safety that could justify invocation of the Suspension Clause. And indeed, the Government never even asserts that the need to limit the rights of these individuals, held on a naval base on an island ninety miles away from Florida, is related to public safety at all.

## III. TO THE EXTENT §1005 PROHIBITS THIS AND ALL OTHER FEDERAL COURTS FROM HEARING CONSTITUTIONAL CLAIMS OF GUANTANAMO DETAINEES, INCLUDING PETITIONER, IT VIOLATES ARTICLE III.

Section 1005 goes beyond stripping the federal courts of habeas jurisdiction. It purports further to bar "any other action against the United States or its agents relating to any aspect of the detention . . . of an alien at Guantanamo Bay, Cuba" who is in military custody or who is held as an "enemy combatant." §1005(e). This action, of course, was brought not merely as one seeking habeas relief, but as an action for mandamus as well, and that alternative basis for district court jurisdiction implicates this aspect of the statute.

The statute eliminates jurisdiction with respect to an entire class of cases, without regard for who the plaintiff is – be it the detainee, his or her next friend, or some third party injured by some aspect of the detention – and regardless of the cause of action under which suit might be brought, be it statutory, like the mandamus action here, see 28 U.S.C. §1361, or directly under the Constitution for equitable relief, see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex Parte Young*, 209 U.S. 123 (1908), or for damages, see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). It eliminates federal court jurisdiction, and hence the possibility of bringing all claims under the federal constitution, including Due Process claims such as the one recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507

(2004), for detention without process and Fifth Amendment claims alleging that a detainee's treatment violated Due Process. In fact, it eliminates for these many hundred detainees, and whatever other detainees the President orders transferred to Guantanamo, even claims for violation of the statutory prohibition of torture contained in the Detainee Treatment Act itself. See DTA §1003 ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment").

Indeed, it purports to create a class of individuals housed in a geographical law-free zone, where they are subject to Executive whim without hope of judicial reprieve, a dangerous and unprecedented situation never countenanced by our courts, and one this Court again refused to permit as recently as *Rasul v. Bush*.

Petitioner himself is within this class, for although there is an exception to the jurisdictional bar permitting those sentenced by a military commission to death or to a sentence of ten years or more to bring an appeal as of right in the D.C. Circuit, which also was given discretionary jurisdiction over other convictions by military commission, see DTA §1005(e)(3), the jurisdictional bar as Respondents would have this Court construe it purports to extinguish the possibility of Petitioner obtaining federal judicial relief for the very constitutional violation alleged here: The violation wrought by forcing a man to stand trial and face life imprisonment before an unconstitutionally composed tribunal that is without authority *ab initio* so to try him. This is not a violation for which under our Constitution one may be made to wait for redress until after a tainted verdict has been announced. See, e.g., *Abney v. United States*, 431 U.S. 651, 659, 661-662 (1977) (internal quotation marks and citations omitted) (a constitutional claim "contesting the very authority of the Government to hale [the putative defendant] into court to face trial," there one under the Double Jeopardy

Clause, is a claim that government may not "subject[t] [that person] to embarrassment, expense and ordeal and compe[l] him to live in a continuing state of anxiety and insecurity;" consequently "if a criminal defendant is to . . . enjoy the full protection of the [Constitution], his . . . challenge . . . must be reviewable before that subsequent [trial]."

In stripping the federal courts of jurisdiction to hear any and all constitutional claims arising among detainees at Guantanamo, this unprecedented statute violates Article III of the Constitution in two ways.

First, if it is construed to limit this Court's jurisdiction, it violates the Article III principle articulated by Professor Hart in his landmark *Dialogue*. While the Congress has broad authority to regulate the jurisdiction of federal courts under the Exceptions Clause, U.S. Const. Art. III, Sec. 2,[5] that authority has a limit. As Professor Hart explained, Congress may not make exceptions to this Court's appellate jurisdiction "as will destroy the essential role of the Supreme Court in the constitutional plan." Hart's *Dialogue*, 66 Harv. L. Rev. at 1402; cf. *Felker*, 518 U.S. at 667 (Souter, J., concurring) (noting that it is an "open" question whether a law completely barring Supreme Court review, even of lower court determinations answering the nonconstitutional question whether a habeas petition is successive, exceeds Congress's Exception Clause power).

Second, if DTA §1005 is construed to apply to this case, this statute goes even further, raising, for the first time in the nation's history, the "'serious constitutional question'" this Court has always in the past avoided "that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988). This Court has avoided that question

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[5] "In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make." U.S. Const. Art. III, Sec. 2.

in what might be called an aggressive manner. Indeed, in *Webster*, while Justice Scalia urged that "it is simply untenable that there must be a judicial remedy for every constitutional violation," id. at 613 (Scalia, J., dissenting), *not a single other Justice joined him*. This Court has never held that Congress may strip the Supreme Court of jurisdiction over certain constitutional claims without vesting authority in *some* federal court to hear those cases. And, given the conclusion reached in *Rasul* and *Hamdi* that the treatment of detainees on sovereign American territory many thousands of miles from the battlefield and months or years after their capture is not within the absolute discretion of the President in exercise of his commander-in-chief power, but is subject to constitutional challenge before the federal courts, the core Article III principle underlying that history must be applied equally here.

Whatever the scope of Congress's power over federal court jurisdiction, if the statute were read to oust federal courts from all jurisdiction to hear Petitioner's constitutional claims, such action would infringe on the irreducible minimum committed to this Court and the lower federal courts by the Constitution, the "judicial power of the United States" vested in them by Article III. This Court should, of course, construe the statute not to apply to this case in order to avoid this most grave constitutional question. But if it should find itself unable to do so, it must hold the statute unconstitutional as a violation of Article III.

## IV. TO THE EXTENT §1005 EXTINGUISHES PETITIONER'S CONSTITUTIONAL CLAIMS, IT VIOLATES DUE PROCESS.

As Chief Justice John Marshall long ago observed, there can be no right without a remedy. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137,163 (1803) (Marshall, CJ.). Under this

principle, if §1005 is held to apply to this case it will, in unprecedented fashion, extinguish the constitutional rights of Petitioner and all other detainees held at Guantanamo, rights for the vindication of which this Court has determined they may invoke the jurisdiction of the federal courts. See *Rasul*, 542 U.S. at 484; id. at 483 n. 15. Because the Act would do so solely on the basis of these detainees' geographic location at Guantanamo Bay, it would do so arbitrarily and in violation of the Due Process Clause of the Fifth Amendment.

It is well-settled that, as a matter of Due Process, a legal claim may be denied only upon "a fair assessment of the facts and the law." See *M.L.B. v. S.L.J.*, 519 U.S. 102, 129 (1996) (Kennedy, J., concurring). Thus an individual may not be barred from prosecuting even an otherwise-available appeal from a paternity suit – a legal action that the Constitution does not require be provided in the first instance – solely on the basis that she has inadequate funds to pay to prepare the record. Id.; see also id. at 570 (opinion of the Court) (relying on both Due Process and Equal Protection). To extinguish her right on that basis would be arbitrary and would thus violate Due Process.

Similarly, this Court found that the mandatory dismissal of a discrimination claim based solely upon the actions of a government official in failing to hold a statutorily-required conference within a mandatory 120-day period violated the claimant's rights under the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The Constitution does not permit a legal claim to be denied solely on such an arbitrary basis, but requires an opportunity to present one's case and to have it fairly judged on the merits. "[T]he State may not finally destroy a [constitutionally protected] interest without first giving the putative owner an opportunity to present his claim of entitlement." Id. at 433.

If it is construed to apply to this case, §1005 presents, in a far more serious context, precisely the situation described in *Logan* and *M.L.B.* The statute does not purport

to alter Petitioner's substantive rights. It "is a procedural limitation on the claimant's ability to assert his rights." *Logan*, 455 U.S. at 434. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Id. at 433. Yet in this case, solely by reason of Petitioner's placement at Guantanamo Bay by the very Executive Branch whose actions are at issue here, the statute purports to extinguish his right to adjudication of his constitutional and other claims.

Here, the most fundamental rights recognized in our law are at stake. Petitioner seeks to avoid being put on trial for a grievous crime before what he alleges is an unconstitutionally composed tribunal. Among other things, he alleges that the unconstitutional composition of the tribunal inherently prevents it from rendering the fair and impartial verdict required by American law. He alleges that the Government may not put him through the "ordeal and compe[l] him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). And this Court cannot ignore what is true: the implications of a guilty verdict rendered by such a tribunal will infect any and all subsequent proceedings in his case – in a way that may well cost him his freedom for the rest of his life. Cf. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (order granting stay) (Scalia, J. concurring) (counting of presidential election ballots under a system alleged to be unlawful had to be stopped *ex ante* in order to avoid the taint of illegitimacy it might cast on the eventual victor).

The Due Process violation is even more troubling than similar ones that have confronted the Court, for the condition upon which a detainee's rights are extinguished – detention *at Guantanamo Bay* – is not fixed *ex ante*. Detainees are wholly within the power of the Executive Branch of Government and, absent some judicial action, completely at its mercy. They may be held at any location, literally anywhere in the world, and may be transferred from one location to another at the absolute discretion of

Executive Branch officials. Detainees who have been declared "enemy combatants" have, indeed, been held not only at Guantanamo, but at other locations throughout the world, including within the continental United States. See, e.g., *Hamdi*, 542 U.S. at 510 (detainee held in South Carolina). The troubling degree of Executive power thus conveyed by the statute to extinguish detainees' claims only exacerbates the Due Process violation involved.

## V. TO THE EXTENT §1005 ELIMATES THIS COURT'S JURISDICTION OVER THE FEDERAL CLAIMS OF DETAINEES HELD AT GUANTANAMO BAY, IT VIOLATES EQUAL PROTECTION.

This Court has determined that detainees in Guantanamo are entitled to petition for writs of habeas corpus and to invoke the protection of the Constitution and laws of the United States. *Rasul*, 542 U.S. at 484. To the extent the DTA is read to eliminate for those held at Guantanamo Bay all federal court jurisdiction to hear their claims of violations of federal constitutional and statutory law, original and appellate, pending and yet-to-be filed, it violates the Equal Protection component of the Due Process Clause of the Fifth Amendment. See *Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995) ("the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable").

As Chief Justice Marshall again explained for the Court, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. at 163.

A jurisdiction-stripping statute of the breadth claimed by the Respondents for §1005 would leave Petitioner with no protection of the laws. It would deny individuals placed at Guantanamo Bay by the Government equal protection of *all* the laws. No statute has ever been construed by this Court to

have such an effect upon individuals entitled to invoke the Constitution's protection. Indeed, this Court has observed that such a "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in [this Court's] jurisprudence." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Such a blanket denial to those placed by the Administration in the prison camp at Guantanamo Bay would have "the peculiar property of imposing a broad and undifferentiated disability on a single named group." Id. at 632. This Court has ruled that this is "an exceptional and. . . invalid form of legislation," id., as of course it must be under a Constitution that guarantees Equal Protection to all "person[s]." U.S. Const. Amdt. XIV.

"It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633. And even if some balancing were appropriate to determine whether such a law complied with the Constitution's command, the statute here could not survive. There is no compelling state interest that requires that detainees at Guantanamo be treated worse than detainees held elsewhere in the world. As this Court has already ruled, there can be no genuine claim of military necessity concerning the rules at Guantanamo so long as it remains "far removed from any hostilities" and the periods of detention have "stretched to months and years," well beyond the "matter of weeks" during which a claim of such necessity would have strength. See *Rasul*, 542 U.S. at 487-488 (Kennedy, J., concurring). Nor, indeed, is there even any rational basis for such a distinction so long as detention at Guantanamo, rather than any of the myriad other federal military detention facilities, remains solely a matter of Executive Branch discretion. See *supra* at 18-19.

## CONCLUSION

It is essential that this Court not permit the Judicial Branch's authority to rule on questions of constitutional right to be ousted by statute, and that this Court's own doors remain open to appeals like the one in this case.

Respondents' motion should be denied and this Court should hear and address the merits of the case in due course.

Respectfully submitted,

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January 31, 2006

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## *AMICUS CURIAE* BRIEF OF 422 CURRENT AND FORMER MEMBERS OF THE UNITED KINGDOM AND EUROPEAN UNION PARLIAMENTS IN SUPPORT OF PETITIONER

**[International Law—Need For Adherence]**

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## INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of a group of 422 U.K. and European parliamentarians, including 310 current or former Members of the U.K. Parliament and 112 current or former Members of the European Parliament (the "*amici*").[1] The full list of *amici* is attached as an Appendix to this brief.

*Amici* are drawn from all across Europe, and the group spans the political spectrum, including senior figures from all major political parties in the U.K.. The group also includes 13 former judges of the highest court in the U.K.; senior lawyers; former Cabinet Ministers, including a Secretary of State for Defense; a former Attorney-General; a former European Commissioner and U.K. ambassador to the United Nations; two former Speakers of the House of Commons; 13 Bishops and Archbishops of the Church of England; a former Archbishop of Canterbury; a Vice President of the European Parliament; and a former Vice President of the European Commission.

The same *amicus* group (originally numbering 271, then 304 and now 422 signatories) filed briefs in support of Hamdan in the courts below and also supported Hamdan's petitions for certiorari. In each of those filings, as here, *amici* express no view on whether Hamdan has engaged in acts of terrorism or any other conduct in violation of the laws of war, international law more generally, or U.S. law. Nor do *amici* seek to express any view on the legitimacy of the military action in Afghanistan or Iraq or the politics or tactics of the "war on terror" in general. These are questions on which *amici* hold differing individual views.

*Amici* have participated in this case from the outset because, despite their divergent political views, they share a

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored the brief in whole or in part and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

common view that it is important to the international legal order that, even when faced with the threat of international terrorism, the United States comply with the standards set by international humanitarian law and human rights law. *Amici* have taken part in these proceedings to urge the courts to ensure that the treatment accorded to prisoners such as Hamdan—be they terrorists or not—meets these standards.

The outcome of this case is, for Hamdan, of course, of enormous personal significance: he faces the prospect of being cast outside the legal order, into a shadow world where neither the Constitution or Laws of the United States nor the rules of international law specifically applicable to individuals caught up in armed combat, nor apparently even the rules of international law relating to fundamental human rights, give him any protection.

For the community of liberal democracies committed to the rule of law, which each member of the *amicus* group is or has been privileged to serve, the stakes are equally high. While this case presents a number of contested issues of U.S. law (which *amici* do not address), to the outside world it boils down to the simple, but crucial, question of whether the system of legal norms that purports to restrain the conduct of states vis-à-vis individuals within their power will survive the terrorist threat. This case can thus be seen as one battle in the war between the evil logic of terrorism and the bedrock principles that individuals are entitled to fair and humane treatment and that the actions of all states are subject to the rule of law—principles which American and coalition soldiers today fight to uphold in Afghanistan, Iraq and elsewhere.

If the Court of Appeals' determination that law, including international law, offers no protection to individuals such as Hamdan is the last word on this question, *amici* fear that the lesson that will be drawn by the wider world is that the evil of terrorism has proved more than a match for our principles. *Amici* urge this Court to reaffirm what liberal democracies the world over have long asserted: that even "amid the clash of arms, the laws are not silent." *Liversage* v. *Andersen*, [1942] A.C. 206 (H.L.).